Supreme Court, U.S.
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No. 05-211

IN THE

Supreme Court of the United States

October Term 2005

LINDA STETLER AND DENNY STETLER,
Petitioners,

versus

SRN ENTERPRISES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

PETITION FOR A WRIT OF CERTIORARI

LINDA STETLER
DENNY STETLER
Spring Creek Air Park
Albany, Kentucky
Pro Se Petitioners

WESTERFIELD-SONTE CO., 619 W. KENTUCKY-P.O. BOX 3281, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the Kentucky Court of Appeals erroneously held, and the Kentucky Supreme Court erroneously affirmed, that the Petitioner's appeal to that court was not timely filed.

2. Whether a party can file a second motion, pursuant to CR 59.05, raising new questions which have arisen since the filing of the first CR 59.05 motion and, therefore, were not raised upon the initial motion; and, if so, whether the filing of such a motion tolls the time for filing a notice of appeal.

3. Whether the Kentucky Court of Appeals erroneously held that the Petitioner's second CR 59.05 motion raised no new issues which had not been raised in her first CR 59.05 motion.

4. Whether the actions of the trial court infringed the Petitioner's right to the Due Process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2005
No._____

Linda Stetler and Denny Stetler, Petitioners

v.

SRN Enterprises, Inc.. Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Linda Stetler and Denny Stetler, the Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered in the above-entitled case on June 11, 2005

OPINION BELOW

The judgment of the Supreme Court of Kentucky (Appendix D) was entered on June 11, 2005.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257.

PARTIES

Linda Stetler and Denny Stetler, Petitioners

SRN Enterprises, Inc., Respondent

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STATUTES INVOLVED

United States Constitution, Amendment V

United States Constitution, Amendment XIV § 1

CR 59.05

STATEMENT OF THE CASE

The Petitioners, Linda Stetler and Denny Stetler, are now and were at all times pertinent hereto, the owners in fee simple of a certain tract of real property in Clinton County, Kentucky, known as Spring Creek Air Park. This property consists of an airport runway, a resort lodge, and numerous building lots which the Movants were and are developing into a resort area. The aforesaid realty is located adjacent to Dale Hollow Lake, and development of the resort has been proceeding for approximately ten years.

On January 24, 1997, the Stetlers executed a note and mortgage in favor of Spring Creek Enterprises, Inc, and the Spring Creek property served as the collateral securing the indebtedness. The Stetlers transferred the Spring Creek property to Spring Creek Air Park, Inc. in June, 1997, subject to the aforesaid mortgage. Spring Creek Enterprises, Inc., assigned its rights to SRN Enterprises, Inc. on December 30, 1998.

On July 31, 2002, SRN filed the instant mortgage foreclosure action, and on April 24, 2003, moved the court to grant summary judgment and to appoint a receiver. The court granted summary judgment by order entered June 16, 2003, and by further Order, dated July 7, 2003, appointed a receiver. Upon learning of these orders, Movants' then counsel, Charlie C. Pharis, Esq., contacted the Clinton Circuit Clerk with the intention of preparing and filing a motion to vacate the order. However, he was told by the clerk that the file had been either

lost or misplaced. It has not been located at this writing, and is still missing.

On June 25, 2003, the Movants' then counsel, Mr. Pharis, filed a Motion to Alter, Amend or Vacate the Summary Judgment and Order of Sale. Loss of the file was not among the reasons advanced in that motion, since Mr. Pharis had not yet been advised by the Clinton Circuit Clerk that the file was missing. It was this Motion which the circuit court granted by Order dated March 6, 2004 and by a second Order dated March 9, 2004.

The Clinton Circuit Clerk submitted an affidavit which was filed in the record on July 25, 2003, in which she stated that:

> The Order for Summary Judgment, the Order of Receivership, and the Motion to Alter, Amend or Vacate were all filed along with the Supplemental Memorandum for each after the loss of the file.

Affidavit of Linda (Polly) Groce ¶ 5.

It is clear, therefore, that when the trial court's order granting summary judgment, and the Petitioners' motion to vacate that judgment were filed, there was no record of the file extant, since that record had already been lost or misplaced, and has never been recovered.

Thereafter, on October 11, 2003, the Petitioners retained new counsel and filed a motion, pursuant to CR 60.02, to set aside the summary judgment and order of sale on the grounds that the file had been lost. **This motion has never been ruled upon, and remains pending before Clinton Circuit Court.** Subsequently, on January 30, 2004 Respondent filed a motion asking the court: "to enter an order establishing the record." Respondent's counsel attached his affidavit which stated:

> I attest that the pleadings, orders, and other

documents attached hereto as Exhibit A are true and accurate copies of the pleadings of the above captioned case.

Affidavit of Henry E. Kinser ¶ 2.

On March 5, 2004, Clinton Circuit Court entered an order overruling the Petitioners' motion to alter, amend or vacate, granting Respondent's motion to reestablish the record, and setting the amount of the supersedeas bond (although the Movants, obviously, had not yet filed a notice of appeal). On March 18, 2004, the Petitioners filed a Motion to Alter, Amend or Vacate that Judgment, **raising new and different issues than those which they had raised in the motion to alter, amend or vacate which they filed on June 25, 2003**, and they also asked the court to make findings and conclusion in support of its summary judgment.

The circuit court overruled these motions by order dated March 30, 3004 and entered of record April 1, 2004. The Stetlers thereupon appealed to the Kentucky Court of Appeals. On May 19, 2004, Respondent moved that court to dismiss the Movants' appeal, on the grounds that the appeal was not timely filed. As shown below, the Respondent's argument was based upon a misapprehension of pertinent case law, and should have been disregarded by the Court of Appeals.

That court, however, granted the Respondent's motion and dismissed the appeal. Petitioners filed a timely motion to reconsider. That motion was denied by order dated 8/23/04. The Petitioners then moved the Kentucky Supreme Court to grant a Discretionary Review of that Order of Dismissal.

The Kentucky Supreme Court denied that Motion by Order dated June 11, 2005. This appeal followed.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONERS' APPEAL WAS NOT UNTIMELY.

As grounds for its Motion to Dismiss, SRN stated:

> This appeal should be dismissed because the Notice of Appeal was not timely filed. First, after a motion to alter, amend or vacate a judgment was filed on June 25, 2003 and overruled on March 5, 2004, an additional motion to alter, amend or vacate the Summary Judgment and Order of Sale does not lie. After a motion to alter, amend or vacate a judgment is overruled, an appeal must issue within thirty days thereafter. A party cannot extend the appeal time by filing additional motions to alter, amend or vacate the same summary judgment and order of sale. Thus, the summary judgment and order of sale became final and non-appealable on April 5, 2004. The appeal was filed on May 1, 2004, almost two months after the original motion to alter, amend or vacate was overruled.

Respondent's Motion at 2.

The Respondent has misapprehended both the facts and the law upon which it relies. First, Respondent has evidently failed to note that Judge Weddle issued a second Order dated March 6, 2004 and entered of record on March 9, 2004, which supplemented and replaced his Order of March 5, 2004.

Second, the timely motion which Petitioners filed on March 19, 2004, did not ask the trial court "to alter, amend or vacate the Summary Judgment and Order of Sale," as the Respondent mistakenly alleged. As a reading of that motion will show, the Petitioners' motion of March 19, 2004 asked the trial